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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Appellants

v.

STEPHEN J. ROY, *et al.*,

Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania

BRIEF *AMICI CURIAE* OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN YOUTH COUNCIL, INC., WINNEBAGO TRIBE OF NEBRASKA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF MONTANA AND KOOTENAI TRIBE OF IDAHO IN SUPPORT OF APPELLEES

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October, 1985

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IN THE
SUPREME COURT OF THE UNITED STATES
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MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al., Appellants,

v.

STEPHEN J. ROY, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN YOUTH COUNCIL, INC., WINNEBAGO TRIBE OF NEBRASKA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF MONTANA AND KOOTENAI TRIBE OF IDAHO IN SUPPORT OF APPELLEES

Pursuant to Rule 36.2, the National Congress of American Indians, a corporation having its principal office at 804 D Street, N.E., Washington, D.C.

20002; the National Indian Youth Council, Inc., a non-profit corporation with offices located at 318 Elm Street, S.E., Albuquerque, New Mexico 87102; the Winnebago Tribe of Nebraska, P.O. Box 681, Winnebago, Nebraska 68071; the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Box 278, Pablo, Montana 59855; and the Kootenai Tribe of Idaho, P.O. Box 1269, Bonners Ferry, Idaho 83805; file the attached brief amici curiae in support of Appellees in the above-captioned case. Appellees have consented in writing to the filing of this brief, and a copy of their consent letter is appended hereto. Appellants, Secretaries Heckler and Block, through their counsel of record, have also consented to the filing of this brief by written letter mailed to amici's counsel on October 2, 1985; Appellant indicated

it would file a copy of said letter with the Court on October 3, 1985.

INTERESTS OF AMICI CURIAE

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indians and Alaska Native people. NCAI and its membership have a profound concern with the ability of Indians and Indian tribes to protect their religious rights under the First Amendment. Such rights are critical to the survival of Indian tribes as distinct cultural entities.

The National Indian Youth Council, Inc. (NIYC) is a national, non-profit

Indian organization which was founded in Gallup, New Mexico in 1961. Since that time NIYC has engaged in a number of organizing activities and legal challenges which have attempted to preserve and enrich traditional Indian communities and protect Indian traditions on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of American Indian religions, including Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980) and Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981).

The Winnebago Tribe of Nebraska, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana and the Kootenai Tribe of Idaho are federally recognized tribes of more than 6,000

members. The Tribes are participating as amici because many of their members maintain their traditional Indian religious beliefs and practices. They share deep concern for all Indian peoples whose religious freedoms are threatened by government action.

SUMMARY OF ARGUMENT

The fundamental purpose of the religion clauses of the First Amendment is to protect and nurture the freedom of conscience of individuals in our pluralistic society. But when counter-balanced against the purpose of federal laws such as the Social Security Act individual religious beliefs may appear to pale in importance. Thus to protect these beliefs the decisions of this Court have demanded that the means adopted by government to achieve compelling purposes be the "least restrictive" available.

On a broad scale the interests which the Government purportedly seeks to protect in this case - namely, the prevention of fraud and the enhancement of efficiency in administering Social Security Act programs - are important. But the Government cannot demonstrate that the means chosen, requiring Social Security numbers of all applicants and their dependents, without exception, is the least restrictive of Mr. Roy's sincerely held religious beliefs. Mere speculation that creating an exception for Mr. Roy's daughter, Little Bird of the Snow, would lead to the potential for widespread abuse of and massive increase in administrative cost to the programs involved does not, standing alone, justify infringement. Labeling these interests "programmatic governmental interests" does not change that result.

Amici are particularly concerned about this case because the religious beliefs involved are those of a Native American. Mr. Roy's beliefs are surely not entitled to greater protection than the religious beliefs of any other individual or group. But Congress, through the American Indian Religious Freedom Act of 1978, 42 U.S.C. §1996, has expressly acknowledged the commitment of the United States to respecting the religious beliefs of Native Americans; recognizing that because of a lack of sensitivity and understanding federal laws have oftentimes violated such beliefs. As a statement of federal law and policy AIRFA embodies the fundamental principle of the First Amendment that exceptions to government-sponsored activities or regulations must be made when sincerely held religious beliefs are

infringed thereby. To subordinate the religious beliefs of individual Native Americans to programmatic governmental interests, as the Government would advocate here, violates the express dictates of AIRFA and the First Amendment to the Constitution.

Moreover, the federal departments in this case have failed to fully comply with Section 2 of AIRFA, 92 Stat. 470, which mandated that they conduct an internal assessment of whether their regulations, policies and practices are violative of AIRFA and the First Amendment rights of Indian people. It is conceivable that this case could have been avoided if the requirements of Section 2 had been met. The remedy for a Section 2 violation in the context of

this case is not clear[1]; at a minimum, however, it is evidence of federal administrative intrasigence which cannot be allowed to persist.

ARGUMENT

I. THE GOVERNMENT'S POSITION IN THIS CASE SUBVERTS THE INTENT OF CONGRESS AS EXPRESSED IN THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978 AND PREPETUATES THE HISTORY OF SUPPRESSION OF AMERICAN INDIAN RELIGION IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

At stake in this case are the religious beliefs of one Native American, Mr. Stephen Roy, and his right to maintain those beliefs, against the alleged interests of the federal government in preventing fraud and abuse in its public assistance programs. The Government asserts, without any credible evidence, that making one exception in

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[1] See Discussion in Section II, infra.

this case, to the requirement that all applicants provide Social Security numbers ("SSN") as a precondition to receiving welfare benefits, will invite fraud and abuse upon the entire system. It thus argues that the Court must balance what it labels its "programmatic governmental interests" against Mr. Roy's sincere religious beliefs.

As Indian tribes and national Indian organizations, amici are vitally concerned with the protection of the First Amendment rights of Native Americans, and with challenging federal or state laws, regulations, policies and practices which may infringe upon those rights. To that end amici consider this an important case: irrespective of whether Mr. Roy's beliefs concerning the SSN requirement are shared by all Indian people, they are religious in nature,

sincerely held, and are thus entitled to constitutional protection to the same degree as are non-Indian religious beliefs. Moreover, as a general proposition the decision in this case will have broad implications for the manner in which federal departments and agencies view and treat Indian religions and the corresponding ability of Indian people to practice their traditional religions.

The Government in the district court action challenged Mr. Roy's beliefs as irrational, not religious, and therefore not deserving of First Amendment protection. Roy v. Cohen, 590 F.Supp. 600, 609 (D.W.D. Penn. 1984). The district court found otherwise. Id. The Government has not challenged these findings on appeal; nonetheless, clear from a reading of its brief is the

impression the Government has little patience with what it considers to be Mr. Roy's highly unorthodox religious beliefs. Intolerance of this nature toward Indian religion cannot be allowed to pervade the federal administrative bureaucracy.[2/]

[2/] Troubling enough is the message the Government's position in this case sends to practitioners of traditional Indian religions. The Government, through its appeal, is sending an equally cryptic message to persons of all religions that are not dominant in this country. For, as Felix S. Cohen, the preeminent scholar in the field of federal Indian law, once noted:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. . . .

Cohen, The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy, 62 Yale L.J. 348 (1953).

Congress sought to put an end to the federal intolerance of Native American religion of the kind espoused in this case through the American Indian Religious Freedom Act of 1978 (AIRFA), Public Law 95-341, 92 Stat. 469, 42 U.S.C. §1996. Enacted as a "Joint Resolution on American Indian Religious Freedom", AIRFA set forth the unequivocal policy of the United States to "protect and preserve for American Indians their inherent freedom to believe, express and exercise. . . traditional religions." Congress made certain findings regarding Indian religion, contained in AIRFA's preamble, among which include:

> Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefitted from a rich variety of religious heritages in this country;

• • •

> Whereas the lack of a clear, comprehensive, and consistent federal policy has often resulted in the abridgement of religious freedom for traditional American Indians;
>
> • • •
>
> Whereas such religious infringements result from the lack of knowledge of or the insensitive and inflexible enforcement of Federal policy and regulations premised on a variety of laws. . . passed without consideration of their effect on traditional American Indian religions.

92 Stat. 469.

These findings are significant. For the first time in the United States' history Congress has expressly acknowledged, as a matter of law and policy, its affirmative obligation to protect Indian religious beliefs. Explicit in the findings quoted above is the admission that federal laws, regulations and policies - both

intentionally and unintentionally - historically have infringed upon the First Amendment rights of American Indians.

The position advocated by the Government in this case, regrettably, perpetuates the very attitude of insensitivity and hostility which Congress sought to stem by the passage of AIRFA, little more than seven years ago. Native Americans represent a small minority group in the United States today, with numbers close to 1.4 million people. Oftentimes their religious beliefs and practices are considered unorthodox, especially by members of Christian religious groups. Yet for these very reasons Congress in AIRFA directed federal agencies to assess their regulations, policies and practices to determine whe.e they must

yield to protect Indian religious beliefs. Section 2 of AIRFA, 42 Stat. 470. (See discussion, infra.) The case presently before the Court demonstrates the continued intransigence of the federal bureaucracy to yield despite express congressional admonition to the contrary. If the Government's position is allowed to prevail the best intentions of Congress to protect our "rich variety of religious heritages" will have little meaning.

Some of the most eloquent pronouncements of the Supreme Court have been made concerning the sanctity of religious freedom in our country. Just last Term the Court, in an opinion by Justice Stevens, paid homage to the importance of the First Amendment:

> [The First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of

> worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.
>
> • • •
>
> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of this right to refrain from accepting the creed established by the majority. Wallace v. Jaffree, 472 U.S. ____, 86 L.Ed.2d 29, 39-40 (1985).

At the same time, however the Court noted the historical limitations of the Amendment's intent:

> At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism [footnote omitted]. Id. at 40-14.

Yet the Court made clear that times and circumstances had changed; that the Constitution and the Bill of Rights, if truly organic and dynamic, must meet the needs of an ever-increasingly complex society.

> But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all [footnote omitted].

Id. at 41.

But Native Americans, perhaps more than any minority racial group in this country, have sufficient reason to be skeptical of whether the First Amendment as a protectorate of their rights will withstand the challenge when seriously put to the test. It is for this reason that amici take such great interest in

the case at bar. The extremism of the government's position in this case has put religion, specifically the religious beliefs of one Indian, on trial. Certainly Congress, through AIRFA, did not intend such a result; this Court should not sanction it.

Amici would generally agree with Justice Stevens that the prevailing public sentiment from the 16th through the 19th centuries did not tolerate "equal respect" for the notion of "freedom of conscience" for non-Christians, including Native Americans.[3/] Indeed, absolute

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[3/] As Joseph Story noted: "The real object of the [First] amendment was not to countenance, much less to advance, Mohammedism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, . . ." 2 J. Story, Commentaries On The Constitution Of The United States, §1877, p. 594 (1851).

indigation and intolerance regarding Indian religion marks the pre-Constitutional era in federal-Indian relations. Indian people were treated as heathens and savages[4]; entire communities of Indian people were systematically murdered and villages destroyed by the first Pilgrims, with "God's" blessing. William Bradford was to remark, concerning the burning of a Pequot Village by the non-Indian people of Massachusetts, in his History of Plymouth Plantation:

4/John Lawson, a colonist leader from Carolina, is quoted as saying: "We look upon them [Carolina Indians] with Scorn and Disdain and think them little better than Beasts in Human Shape." The History of Carolina (Charlotte, North Carolina, 1903) p. 141.]

> Those that scaped the fire were slaine with sword; some hewed to peeces, others rune throw with their rapiers, so as they were quickly dispatch, and very few escaped. It was conceived they thus destroyed about 400, at this time. It was a fearful sight to see them thus frying in the fryer, and the streams of blood quenching the same, and horrible was the stinck and sente there of; but the victory seemed a sweete sacrifice, and they gave the prayers thereof to God, who had wrought so wonderfully for them, thus to enclose their enemise in their hands, and give them so speedy a victory over so proud and insulting an enimie. Virgil J. Vogel, This Country Was Ours, p. 42 (Harper & Rowe, New York 1972).

And as a general proposition it was believed by religious leaders that God had sanctioned the ruthless extermination of Indian populations, either by murder or by disease brought to the New World by explorers and immigrants:

> The prominent Quaker John Archdale included in his

> report on the disappearance of Indians in the Carolinas the statement that Providence has reserved the extermination of the Indians for the "Spanish Nation, and not for the English, who in their Natures are not so cruel." More "the Hand of God was eminently seen in thinning the Indians, to make room for the English. . . it at other times pleased Almightly God to send unusual Sicknesses amongst them, as the Smallpox, to lessen their Numbers; so that the English, in Comparison to the Spaniard, have but little Indian Blood to answer for." Archdale did not wholly excuse the English in their treatment of the Indians, but he did conclude that for the killing of Indians "it pleases God to send. . . an Assyrian Angel to do it himself" and pointed out a final "Example of God's more immediate Hand, in making a Consumption upon some Indian nations in North Carolina." (Emphasis in original.)

Hanke, Lewis, Aristotle and the American Indians, (London, 1959), p. 100, quoting Archdale, "A New Description of That Fertile and Pleasant Province of Carolina. . . (1707)," in Carroll, B.R.,

Historical Collections of South Carolina, II (2 Vols. New York, 1836), 88-89.[5]

Even while the earliest cases of the Supreme Court addressing the legal status of Indian nations considered them to be "distinct, independent political communities" where the laws of the

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[5] The Spanish, uncertain about the theological status of the Natives in the New World, and to make certain that conquests proceeded according to Christian principles, adopted the famous "Requirement," which had to be read formally to the Indians they encountered before any hostilities could commence. The Requiremento began with a brief history of the world since its creation, continued with an account of the establishment of the Papacy and described the donation by Pope Alexander IV of the lands then occupied by the Indians to the kings of Spain. The Indians, after hearing these sacred words, were supposed to acknowledge the lordship of the kings of Spain and to allow the Christian faith to be preached to them. Failure to surrender to the Spanish by the Indian justified whatever cruelties then followed and made the ensuing war theologically proper. Hanke, Lewis, Aristotle and the American Indians, at pp. 15-16.

states had no force and effect, Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), as a practical matter little thought was given to respecting the religious and cultural integrity of Indian people. Samuel Worcester, the plaintiff in Worcester, was a missionary of the American Board of Commissioners of Foreign Missions, who resided in the Cherokee Nation under the authority of the President of the United States. Id. at 528-29.

Despite the profound influence these early decisions of the Court had upon the establishment and development of federal Indian law, the other branches of the federal government - the Executive and the Legislative - paid little heed to their fundamental teachings. John Collier, Commissioner of Indian Affairs From 1933 through 1945, noted:

Chief Justice John Marshall's opinions are the foundation of the Indian law of the United States and of that policy which became official when Congress passed the Indian Reorganization Act of 1934.

• • •

Basically, they assert that the Indian societies exist by inherent right and by pledge and policy of the United States; that only those powers expressly taken away by act of Congress are surrendered by any Indian tribe; that the course of events has caused these Indian sovereignties to become dependent on the national government of the United states for protection, advice and aid. But there is a sad corollary to this position, and it was acknowledged by John Marshall: these dependent sovereignties are dependent on the political, and hence also on the executive, arm of the national government. President Jackson remarked, "John Marshall made the Indian law, let him enforce it." Marshall foreknew the horrors which were to come.

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The Supreme Court never consistently departed from Marshall's position. Congress

> and the Executive, however, swung just as far from him as it was humanly possible to go. It was more than a century before Marshall prevailed in fact. For hundreds of the Indian societies this was too late. Hundreds of streams of tradition, of institutional systems potent and splendid, of noble and flavorous personality types, were wiped from the book of life in that century after John Marshall. (Emphasis added.)

Collier, "United States Indian Administration As A Laboratory Of Ethnic Relations," Social Research 12:265-303, 268-69 (1945).

Numerous federal laws enacted by Congress, and implemented by administrative agencies through regulations and policies, have devastated Indian religion and culture. These laws and policies have led to the conspiracy of government agents and religious missionaries to convert Indians to Christianity to hasten the

process of civilisation[6]; the removal of entire tribal communities to distant reservations away from sacred lands and traditional hunting and fishing grounds[7]; the granting of express tracts of land on Indian reservations by treaty or executive order to Christian missionary societies[8]; the General Allotment Act of 1887 and the resulting breakup of traditional communal land ownership as

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6/ See, generally, Prucha, Frank, American Indian Policy Crisis (Norman: University of Oklahoma Press, 1976).

7/ See, remarks of President Andrew Jackson in A Compilation of the Messages and Papers of the Presidents, Vol. III (J.D. Richardson, ed.), p. 519.

8/ See, e.g., Article 4 of the 1864 Treaty With the Chippewa of Saginaw, Swan Creek, and Black River, in II Kappler, Laws and Treaties (Washington: Government Printing Office, 1904), pp. 868, 870.

an instrument of the policy of assimilation;[9] the suppression of religious ceremonies and rituals such as the Sun Dance and Ghost Dance[10]; and

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[9]Act of Feb. 8, 1887; 24 Stat. 388, 25 U.S.C. §§331 et seq.; Collier, supra, at 272.

[10]In 1892, Commissioner of Indian Affairs Thomas Morgan revised the Federal regulations governing the operation of tribal courts to prohibit Indian dancing:

> Dances, etc. - Any Indian who shall engage in the sun dance, scalp dance, or war dance, or any other similar feast. . . shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his ration for not less than ten nor more than thirty days, or by imprisonment for not less than ten nor more than thirty days.

Report of the Commissioner of Indian Affairs (1892) p. 29.

the forced burning of medicine bundles and forced attendance of Indian children at Christian missionary boarding schools, often times at great distances from Indian reservations.11/

The Judicial Branch, while less active historically in the extinguishment of Indian culture and the persecution of religious beliefs, nonetheless has displayed extreme insensitivity toward these values. The Supreme Court, for example, in a case involving a conflict over land between a railroad and the Osage Tribe, remarked:

> Though the law as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands has always been recognized, it is

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11/ See, generally, Schaeffer, Claude E., An Acculturation Study of the Indians of the Flathead Reservation in Western Montana, 1934-) (Report to the Commissioner of Indian Affairs).

> to be presumed, as stated by this Court in the Rutte case, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race. . . . (Emphasis added.) Missouri, Kansas & Texas Railway Co. v. Roberts, 152 U.S. 114, 116 (1894).

And in a 1913 decision of the Supreme Court relating to the introduction of liquor onto the Santa Clara Pueblo in New Mexico, Justice Van Devanter quoted with approval a 1906 report of the local Indian superintendent:

> Santa Fe, 1905: "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ritual system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of

> the Pueblos when one of these dances is in session; travelers are met on the outskirts of the Pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact." (Emphasis added.) United States v. Sandoval, 231 U.S. 28, 42 (1913).

Implicit in the characterization of the "secret dance" as an "old pagan custom" is the notion that Indian religious beliefs and practices - predating the advent of Christianity - were not to be tolerated or protected in the constitutional sense as other Judeo-Christian religions.

This legacy of denigration of Indian religion contrasts sharply with the Court's traditional standard for the treatment of unorthodox religious beliefs. Since the early writings of

Madison,[12] Story and others the Court has held steadfast to the notion that individual freedom of conscience and sincere religious belief, irrespective of its eccentricity, is an unalienable right. See, e.g., Watson v. Jones, 80 U.S. (13 Wall.) 679, 782 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which

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[12]/James Madison, writing in 1785, considered it a "fundamental and undeniable truth" that the "religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." J. Madison, "Memorial and Remonstrance Against Religious Assessments, 1785", from The Complete Madison 299-301 (S. Padover ed. 1953), quoted in Wallace v. Jaffree, supra, 86 L.Ed.2d at 41 n. 38.

includes freedom of religious belief, . . . embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths."); United States v. Seeger, 380 U.S. 163, 184 (1965) ("Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "supreme being" or the truth of his concepts. But these are inquiries foreclosed to government."); Thomas v. Review Board, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent or comprehensive to others in order to merit First Amendment protection.")

Until this case the Court has never been directly confronted with an opportunity to consider the constitutionality of a federal statute

which conditions the receipt of a benefit on the willingness of a Native American to compromise his religious beliefs. As stated earlier, AIRFA, and the express findings made by Congress therein, puts to the test the Court's unswerving commitment, reaffirmed most recently in Jaffree, to the protection of First Amendment rights, regardless of the nature of the religion at issue.

Native Americans represent a comparatively small group in this country, whose traditional religious beliefs some would consider extremely unorthodox. Thus, the potential to subordinate their interests to the force of the federal bureaucracies involved in this case is great. The First Amendment, however, prohibits governmental actions that burden an individual's free exercise unless those

actions are necessary to fulfill a governmental interest of the "highest order" that cannot be met in a less restrictive manner. Wisconsin v. Yoder, 406 U.S. 205, 214-215 (1972); Sherbert v. Verner, 374 U.S. 398, 403-09 (1963). For this reason the "least restrictive means inquiry" is considered to be the "critical aspect" of the free exercise analysis. Callahan v. Woods, 736 F.2d 1269 (9th Cir. 1984).

> If a law is found to be reasonable, then the question of its importance is raised. The importance of a law should be measured not by all the benefits it confers on society, but by the incremental benefit of applying it to those with religious scruples. Its importance, in other words, should be the cost of resorting to a nonrestrictive or less restrictive alternative by exempting from the law's coverage those conscientiously opposed to the law. Regulating conduct in some way other than the legislature has chosen usually

> involves some degree of cost, at least potentially, to the efficiency of any regulatory scheme.

Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327, 331 (1969).

The Government here would have the Court abandon the traditional application of the least restrictive means inquiry, foresaking the case-by-case determination in favor of a "programmatic governmental interest" analysis (Brief for the Appellants, p. 29), because it could not, as factual matter, meet the traditional free exercise standard. However, the speculation of widespread fraud and abuse, if this one exception is made, is too specious, too speculative to be accorded any weight. See, Thomas v. Review Board, supra, 450 U.S. at 719; Wisconsin v. Yoder, supra, 406 U.S. at 224-25 (1972).

The adoption of a "programmatic governmental interest" approach, where the cost of "adopting a less burdensome alternative applicable to the populace as a whole" is considered (Br. at p. 29), is wrong for other reasons. It runs contrary to an unambigious line of precedent by this Court. Sherbert v. Verner, supra; Thomas v. Review Board, supra.

Further, and perhaps most importantly for amici, the religious beliefs of individual Indians like Mr. Roy and others - in addition to those of non-dominant religions, long considered sacrosanct by this Court - will be stripped of constitutional protection. Thus as a matter of constitutional necessity a case-by-case analysis must be used to determine whether the effect of government activity is the least restrictive upon religious beliefs.

The risk of adopting the Government's approach has clearly been recognized by this Court before:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. Engel v. Vitale, 370 U.S. 421, 431 (1962).

More recently the Court stated:

> Nor is the impact of the [governmental action] confined to grave interference with important. . . religious tenets from a subjective point to view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, [the government action] carries with it a very real threat of undermining the . . . community and religious practices as they exist today; they must either abandon belief . . . or be forced to migrate to some other and more tolerant region. Wisconsin v. Yoder, supra, 406 U.S. at 218.

And never stated so eloquently in the context of Native American religious beliefs than by the California Supreme Court in the case of People v. Woody, 394 P.2d 813 (Calif. 1964):

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve

> a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.

Id. at 821-22.

Perhaps the most illuminating statement of the Government's position in this case is found at page 42 of its brief:

> There is something fundamentally wrong with the notion that an individual can claim an entitlement to governmental benefits while at the same time refusing to comply with that portion of the program designed to verify eligibility and detect fraud most effectively. (Emphasis added.)

The implication of that statement for Mr. Roy and others similarly situated is clear: otherwise eligible individuals who hold sincere, albeit unorthodox, religious beliefs must be prepared to prostrate those beliefs to receive

public assistance benefits. Would the Government have Mr. Roy survive on religious beliefs alone, to satisfy a wholly unproven need to protect the security and efficiency of the federal benefit programs involved? Amici submit that there is "something fundamentally wrong" with the Government's logic. The decisions of this Court have never allowed such a result. Yoder, supra; Sherbert, supra; Thomas, supra; certainly Congress, through AIRFA, sought to preclude such a result.

II. THE FEDERAL DEPARTMENTS OF AGRICULTURE AND HEALTH AND HUMAN SERVICES HAVE FAILED TO COMPLY WITH THE EXPRESS PROVISIONS OF SECTION 2 OF THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT WHEREIN CONGRESS INVITED RECOMMENDATIONS FOR LEGISLATION ACTION TO CHANGE EXISTING LAWS VIOLATIVE OF AMERICAN INDIAN RELIGION

The Government in brief seeks to impress upon the Court the importance of

preventing fraud and abuse with its public assistance programs, and the corresponding difficulty and cost associated with accomodating Mr. Roy's religious beliefs. It should not now be heard to complain, inasmuch as such an examination was expressly required in 1978 by the American Indian Religious Freedom Act. Section 2 of AIRFA contained the following mandate to federal departments and agencies:

> Sec. 2 The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative

policies and procedures, and any recommendations he may have for legislative action. (Emphasis added.) 92 Stat. 470.

Pursuant to Section 2, the President directed the Secretary of the Department of the Interior to establish an interdepartmental Task Force to prepare the report to Congress. Within one year of the date of AIRFA's enactment, the Task Force published its report, entitled the AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, P.L. 95-341: Federal Agencies Task Force (August 1979) ("AIRFA Task Force Report").[11/] The AIRFA Task Force conducted a number of public meetings nationwide for the purpose of consulting with religious leaders; however, their

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11/For the Court's and parties' convenience, Amici have lodged a copy of the AIRFA Task Force Report with the Court.

efforts did not supplant the obligation of each department and agency to hold independent consultations.[14/]

Representatives from the Department of Agriculture and Health, Education and Welfare (now Health and Human Services), which are responsible for administering the Food Stamp and Aid to Families with Dependent Children programs, participated in the Task Force from its inception. See, AIRFA Task Force Report, p. 24. And both Departments, to varying degrees, initiated internal reviews of their respective regulations and policies, as mandated by Section 2, to search for possible AIRFA violations. But neither fully complied

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14/ See AIRFA Task Force Report, Appendix C, for evidence of consultation by the U.S. Fish and Wildlife Service, the National Park Service, the U.S. Customs Service, the U.S. Navy, etc.

with the Act.

By undated letter, Secretary of Agriculture Bergland wrote to James Abourezk, Chairman of the Senate Select Committee on Indian Affairs, indicating the establishment within his Department of a "Native American Task Force. . . to improve the effectiveness of USDA's programs as they apply to Native Americans." The Task Force was composed of "four. . . assistant secretaries and supporting agency staff people as required." See Bergland letter to Abourezk, AIRFA Task Force Report, Appendix A.

However, there is no evidence in the Task Force Report - which contains copies of all official agency correspondence relating to compliance with Section 2 of AIRFA - that Agriculture's Native American Task Force ever met, discussed possible problems

under the Food Stamp Program, sought consultation with Native American religious leaders concerning that program, or submitted a final report to the AIRFA Task Force.[13/]

Similarly, Secretary Califano of the Department of Health, Education and Welfare, by letter dated May 31, 1979, transmitted to Secretary Andrus of Interior a copy of a report summarizing the internal review conducted by various HEW agencies. The report of the Social Security Administration's review stated as follows:

[13/]The only correspondence from an agency within the Department is a May 10, 1979 letter from the Forest Service to the Interior Department, relating to certain forest management and planning practices which may raise Indian religion concerns. See AIRFA Task Force Report, Appendix B. (See also, Forest Service Summary Statement, AIRFA Task Force Report, pp. 24-1)

> The self-assessment conducted by the Social Security Administration did not reveal any policies or procedures which need to be addressed. However, the agency is willing to continue its review if Native American religious leaders wish to provide specific examples of areas which should be examined. AIRFA Task Force Report, Appendix B.

Like the Department of Agriculture, the Social Security Administration never conducted a comprehensive self-assessment of all its programs. There was no explanation of whether the AFDC program regulations, etc. were examined, nor was there any effort made to consult American Indian religious leaders, in direct contravention of Section 2.

Had there been full compliance with Section 2, especially consultation with Indian religious leaders, it is conceivable that religious objections similar to Mr. Roy's concerning the

Social Security number requirement would have been raised and a recommendation for administrative or legislative action made in the AIRFA Task Force Report. Lower federal appellate courts have unanimously held that AIRFA imposes a procedural requirement on federal departments and agencies to fully consider the impact of administrative activities upon traditional Indian religious beliefs and practices. Failure to do so has been held to be a violation of AIRFA, and the basis for remand to an agency to fulfill its AIRFA duties. See, New Mexico Navajo Ranchers Association v. Interstate Commerce Commission, 702 F.2d 227 (D.C. Cir. 1983); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, ___ U.S. ____, 104 S.Ct. 371 (1983).

A remand in this case, however, is

unnecessary. The Court has been asked to consider the constitutionality of two federal statutes requiring SSN's as a precondition to receiving public assistance benefits. If the district court decision is affirmed, it will be necessary for Congress to consider amending the statutes to cure the defect. Congress has already indicated a receptivity to curing such a defect, both through AIRFA and the requirement that these programs not discriminate in the distribution of benefits on the basis of race or religion. See 42 U.S.C. §2000d; 7 U.S.C. §2020(c). Likewise, the federal departments administering the statutes will have to amend their regulations and operating procedures accordingly. This should be done in consultation with Indian religious leaders. In this way

compliance with AIRFA, albeit late, will be effectuated.[16/]

III. CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

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OCTOBER, 1985

16/A remand to the district court with instructions to order compliance with AIRFA by these federal departments will be necessary, however, if the Court upholds the challenged statutes as constitutional.

McKEES, WALLACE & NURICK
ATTORNEYS AT LAW

RECEIVED
SEP 09

September 4, 1985

Steve Moore, Esquire
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

Re: Mackler v. Bay
Supreme Court of the United States
October Term 1984 (No. 84-7901)

Dear Steve:

It occurred to me that, although your organization intends to file an amicus brief on behalf of appellees, you had not requested our written consent as required by Supreme Court Rule 36.2. Therefore, I am enclosing our written consent which you may file with the brief as required by Rule 36.2.

Again, thank you for your consideration and assistance.

Very truly yours,

McKEES, WALLACE & NURICK

By Franklin A. Miles, Jr.

FAM/vmw

Enclosure

cc: Gary S. Gildin, Esquire